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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEAN FUMERO SOTO, *et al*,
and RAFAEL RIVERA FERNANDEZ, *et al*,
Conditional Cross-Petitioners,

v.

CARLOS CHARDON, *et al*, *Cross-Respondents*.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counsel of Record
JAIME R. NADAL ARCELAY,
CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

SHELDON H. NAHMOD
77 South Wacker Drive
Chicago, Illinois 60606
Tel. (312) 567-5761

Counsel for Cross-Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Where a limitations decision of this Court establishes a new principle of law, where its prospective application will not retard its operation and where substantial inequity and injustice will result from its retroactive application, should that limitations decision be applied prospectively only?

2. Where a federal court applies this Court's *Chevron Oil Company* retroactivity factors, when should it look at the reliance of a litigant on past precedent: at the time a litigant's claim arises, at the time a litigant files his suit, or at the time the new decision comes out?

3. Should the same foreseeability criteria which apply to a § 1983 defendant who raises the objective qualified immunity defense of *Harlow* v. *Fitzgerald* also govern a litigant confronted with an unexpected judicial decision which may apply only prospectively pursuant to *Chevron Oil Company*?

PARTIES TO THE PROCEEDING

The Ninety-One Conditional Cross-Petitioners Are:

A. Thirty-seven Respondents in whose favor the Court of Appeals for the First Circuit entered judgment in one appeal below, Nos. 81-1567 and 1607, and 80-1237 *et al.*[1]

B. Eighteen Cross-Petitioners against whom the Court of Appeals for the First Circuit entered judgment in the same appeal below.[2]

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[1] The group of thirty-seven are:

1) Aurora Sierra Pizarro
2) Virginia Otero Arroyo
3) Juan Fumero Soto
4) Dora Castro de Aguilar
5) Reinaldo Rodriguez Solivan
6) Elba Rosario de Bravo
7) Ramon Norat Zayes
8) Charles H. Quiles Mariani
9) Bienvenido Rivera Diaz
10) Carmen M. Morales Hernandez
11) Juan Rivera Pagan
12) Joaquin Cruz Mendez
13) Ursula Aguilar Quintero
14) Aminta Rivera Cardona
15) Roberto Cruz Cruz
16) nelson Velez Quinones
17) Cristina Cancel Cuevas
18) Maria D. Guerra Navarro
19) Francisco Bonilla Ocasio
20) Heriberto Gallardo Gutierrez
21) Julio E. Colon
22) Aida Rodriguez Rios
23) Jose Ortiz Rivera
24) Carmen Nunez Rivera
25) Carmen L. Negron marin
26) Carmen Garcia Rosado
27) Noelia Torres de Cantres
28) Antonio Rodriguez Rivera
29) Jose E. Aponte de la Torre
30) Carmen H. Montez Velez
31) Nilsa Cardona Flores
32) Elba M. Colon Torres
33) Ana Mercedes Ortiz Colon
34) Sylvia M. Denis
35) Bienvenido Castro del Valle
36) Santiago Gonzalez Velasquez
37) Angela Colon Santiago

[2] The group of eighteen are:

1) Syraida Rosa Cardona
2) Iraida Sanchez Marquez
3) Josefa Marrero Ayala
4) Carmen Ortiz Lemois
5) Carmen D. Perez Roman
6) Antonio Vega Ortiz
7) Kremmly Rodriguez Valentin
8) Angel Luis Marrero Gonzales
9) Iris Camelia Velez Morales
10) Efrain Tacoronte Ortiz
11) Edda I. De Ayala La Fuente
12) Jose A. Alvarado
13) Andres A. Hernandez Ortiz
14) Maria V. Pagan Seda
15) Jose A. Surillo Rodriguez
16) Lydia Munoz Morales
17) Carmen T. Lugo Sotero
18) Jorge O. Principe-Galarza

C. Thirty-six Cross-Petitioners against whom the Court of Appeals for the First Circuit entered judgment in the same appeal below.[3]

The Conditional Cross-Respondents (Who Are Also Petitioners) Are:

Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico, and Oscar Ramos, individually as the Assistant Secretary of Personnel for the Department of Education of the Commonwealth of Puerto Rico.

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[3] The group of thirty-six are:

1) Rafael Rivera Fernandez
2) Ramon A. Vega Cruz
3) Angel Luis Allende
4) Enrique Diaz Maldonado
5) Aida L. Sanchez de Negron
6) Jose R. Munoz Rivera
7) Gladys Rosado Acevedo
8) Sara Velazquez Concepcion
9) Julia Martinez Vda de Calderon
10) Isaias Torres Sanchez
11) Irma I. Baldoni de Valencia
12) Gaspar Rodriguez Rodriguez
13) Yolanda Anguita de Rios
14) Wilfredo Cintron Santana
15) Carmen Roman de Molina
16) Pahita Guadalupe Garcia
17) Carlos Cruz Beltran
18) Claudio Aviles Navarro
19) Angel L. Arzon Mendez
20) Laura L. Santos Roa
21) Evelyn Irizarry Escobar
22) Jose D. Nieves Rivera
23) Herminia A. Ortiz Ortiz
24) Eduardo Tarafa Gonzalez
25) Roberto Velazquez Nieves
26) Enrique Rosado Alverio
27) Saquia Azize Mawad
28) Miguel Alvelo Rodriguez
29) Manuel Rosas Lebron
30) Aida E. Santiago de Orta
31) Jose M. Rosado Sanchez
32) Ramon A. Perez-Ramirez
33) Blanca Cacho Collazo
34) Aida Lopez de Ferra
35) Fanny Cacho de Freytes
36) Cecilio Alvarez Plajas

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v.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Cross-Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered on June 8, 1982, as modified on rehearing on July 6, 1982, insofar as it held that this Court's limitations decision in *Delaware State College* v. *Ricks* should be retroactively applied to these cases. This prayer is made conditionally and only if this Court should grant the Petition for Writ of Certiorari previously requested by Petitioners, Cross-Respondents herein. Cross-Petitioners shall timely file a separate Brief in Opposition to the aforesaid Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the First Circuit dated June 8, 1982, has not been reported, but is reproduced in the Petitioners' Appendix, 7a-37a. The order issued by the First Circuit on July 6, 1982, modifying its opinion of June 8, 1982, is

reproduced in the Petitioners' Appendix, 3a-4a. The orders of the First Circuit entered on July 6, 1982, and July 28, 1982, denying Petitioners' petitions for rehearing, are reproduced in their Appendix, 5a-6a and 1a-2a.

The May 7, 1981 Memorandum Opinion of the United States District Court for the District of Puerto Rico, which was reviewed on appeal by the First Circuit, is reported at 514 F. Supp. 339 (D.P.R. 1981) and reproduced in Petitioners' Appendix, 51a-73a. The District Court's unreported Order of May 7, 1981, which accompanied the foregoing Memorandum Opinion, is reproduced in Petitioners' Appendix, 48a-50a. Also reproduced are the District Court's Order, Petitioners' Appendix, 43a-47a, and Final Order and Judgment, Petitioners' Appendix, 38a-42a, both dated July 24, 1981.

Other opinions entered by the District Courts below, also reviewed on appeal by the First Circuit, are reported at 500 F. Supp. 10 (DPR 1980) and 506 F. Supp. 229 (DPR 1980). The unreported opinions and the judgments entered are printed in the Petition for Writ of Certiorari on file in the *Chardon* v. *Fernandez* case, 454 U.S. 6, No. 81-249 (1981). Cross-Petitioners have not reprinted these unreported opinions and judgments, as it is not necessary to refer to them in order to consider the issues raised by this cross-petition.

JURISDICTION

The judgment of the First Circuit, the court below, was entered on June 8, 1982. Petitioners filed a Petition for Rehearing, which the First Circuit below denied on July 6, 1982. Petitioners' Appendix, 5a-6a. Eight of the Cross-Petitioners timely filed a Petition for Rehearing and Modification of Judgment, which the First Circuit granted on July 6, 1982, and modified its opinion accordingly. Petitioners' Appendix, 3a-4a. Petitioners thereaf-

ter filed a Petition for Rehearing or Modification of Judgment, which the court below denied on July 28, 1982. Petitioners' Appendix, 1a-2a. Petitioners filed a Petition for Writ of Certiorari on August 16, 1982. Cross-Petitioners timely and conditionally filed this Cross-Petition for Writ of Certiorari on September 3, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Cross-Petitioners, numbering ninety-one, filed suit on June 19, 1978, pursuant to 42 U.S.C. § 1983, and 18

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[1] The ninety-one Cross-Petitioners emphasize the independent timeliness of their Cross-Petition because the Petitioners' Petition for Writ of Certiorari asks this Court to review the judgment of only thirty-seven of these ninety-one Cross-Petitioners. *See* Statement of the Case, *infra*.

L.P.R.A. 249(e),[2] as part of a proposed class action against certain high officials (Chardon and Ramos, Cross-Respondents) in the Department of Education of the Commonwealth of Puerto Rico alleging political discrimination in employment. Appendix herein, 1a-8a. On the basis of numerosity the District Court denied class certification on August 21, 1978.

After denial of class certification, the Cross-Petitioners filed (i) a Motion for Reconsideration which was denied on September 29, 1978; (ii) an Amended Complaint naming all the plaintiffs which was denied on November 24, 1978; and (iii) a Motion for Reconsideration which was denied on December 11, 1978.

The Ninety-one Cross-Petitioners then filed separate complaints. *See* e.g., Appendix herein, 11a-17a. After lengthy and protracted proceedings, fifty-five of these Cross-Petitioners ("*Fumero Soto*" Plaintiffs) proceeded to a consolidated jury trial on liability alone on January 26, 1981. After a five day trial a unanimous jury found the Cross-Respondents liable for political discrimination. Chardon and Ramos appealed to the First Circuit.

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[2] This Puerto Rico statute is relevant not to this Cross-Petition, but rather to the soon-to-be-filed Brief in Opposition to the Petition for Writ of Certiorari, and will therefore be discussed in that Brief. It reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

In the meantime, thirty-six other Cross-Petitioners ("*Fernandez*" Plaintiffs) had their complaints dismissed by the district court as time-barred under Puerto Rico law. These dismissals were reversed by the First Circuit on appeal in *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981) wherein *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) was distinguished from the *Fernandez* cases. However, this Court granted certiorari and summarily reversed in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (3 Justices decenting), holding that *Ricks* was indistinguishable. Neither the First Circuit nor this Court in its *Chardon* opinion addressed the question of the retroactive application of *Ricks* to the *Fernandez* cases.[3]

The *Fumero Soto* cases and the *Fernandez* cases (on remand from this Court) were heard and decided on consolidated appeal. After various petitions for rehearing and modification of judgment were considered, the Court of Appeals for the First Circuit in the fifty-five *Fumero Soto* cases affirmed the liability judgment in favor of those thirty-seven Cross-Petitioners, who had received letters of prospective dismissal or demotion on or after June 17, 1977 and reversed the judgment of those eight-

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[3] The *Fernandez* Plaintiffs raised this retroactivity issue in their subsequent Petition for Rehearing to this Court in *Chardon* v. *Fernandez*, *supra*, which was denied. However, this denial has no conclusive effect on any of the Cross-Petitioners here, including the *Fernandez* Plaintiffs. As the First Circuit stated in response to the Cross-Respondents' argument on this question:

> "Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari)." Petitioners' Appendix, 19a n.7.

een Cross-Petitioners who had received letters of dismissal or demotion before June 17, 1977. Appendix 37a. Additionally, the Court of Appeals held that all thirty-six Cross-Petitioners in the *Fernandez* cases were time-barred, having received their letters of dismissal or demotion before June 17, 1977. *Id.*

As to *all* of the Cross-Petitioners, the Court of Appeals ruled that this Court's limitations decision in *Delaware State College* v. *Ricks*, *supra*, should be retroactively applied. Petitioners' Appendix, 22a-23a. The Court of Appeals also held under Puerto Rico law that a class action asserting a section 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew. Petitioners' Appendix 18a.

Petitioners have filed a Petition for Writ of Certiorari in this Court asking it to review this latter tolling issue. Cross-Petitioners file this Cross-Petition and ask the Court conditionally to grant certiorari and review the *Ricks* retroactivity issue in the event it decides to review the tolling issue raised by Petitioners. Cross-Petitioners shall also file a timely Brief in Opposition to the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE CONDITIONALLY GRANTED

1. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Is In Conflict With This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson*.

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) decided on December 15, 1980, this Court announced a

new federal accrual rule in employment discrimination cases and held that a college professor's employment discrimination causes of action accrued when he was notified of the adverse tenure decision by the college, and not when his terminal contract expired. *Ricks* was decided fully *three and one-half years after* the acts of employment discrimination, directed at Cross-Petitioners, occurred and *two and one-half years after* the *Fernandez* and *Fumero Soto* cases were filed. Nevertheless, the First Circuit held that all thirty-six *Fernandez* cases and all fifty-five *Fumero Soto* cases were governed by *Ricks* retroactively.[4] Cross-Petitioners submit that the First Circuit's reasoning and conclusion are fundamentally in conflict with this Court's non-retroactivity decision in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971).

In *Chevron Oil Company*, this Court was confronted with the applicability of its limitations decision in *Rodrigue* v. *Aetna Casualty and Surety, Co.*, 395 U.S. 352 (1969) to a personal injury suit filed several years before *Rodrigue* under the *Outer Continental Shelf Lands Act*, 43 U.S.C. section 1331 et seq. ("Lands Act"). When the suit was filed, the prevailing federal rule in such suits made general admiralty law, including laches, applicable. However, *Rodrigue*, announced while pretrial discovery proceedings were still underway, held that state limitations law was applicable to such suits. The plaintiff's suit was then dismissed by the District Court, following *Rodrigue*, under the applicable Louisiana one year limitations period.

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[4] Thirty-seven of the *Fumero Soto* cases were nevertheless not time-barred because the applicable Puerto Rico statute of limitations had been tolled in such a manner as to render the complaints in those cases timely filed. *See* Petitioners' Appendix, 15a-18a.

In its decision on this issue, this Court held that *Rodrigue* should not be applied retroactively to the suit before it. It set out a three factor test for cases dealing with the nonretroactivity question:

(1) *"[T]he decision to be applied nonretroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed."*

2. "[T]he merits and demerits in each case [must be weighed] by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

3. "[T]he inequity imposed by retroactive application [must be weighed] for [w]here a decision of this Court could produce a substantial inequitable result if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (Emphasis added)

In applying these factors to the case before it and holding that *Rodrigue* was not to be applied retroactively, this Court emphasized the following considerations, which are equally applicable to these cases.

A.

Rodrigue raised an issue of first impression in this Court under the Lands Act whose resolution was not clearly foreshadowed.

Similarly, *Ricks* was a case of first impression in this Court on the issue of accrual of a federal employment discrimination cause of action, whose resolution was not clearly foreshadowed. It is significant that the First Circuit did not even respond to Cross-Petitioners' argument

on appeal that *Ricks* was a case of first impression in this Court. Furthermore, not only was there no relevant prior decision of this Court dealing with this issue, but as discussed next, the prevailing rule in the circuits, *both when the acts of employment discrimination occurred and when these cases were filed*, was clearly to the contrary of *Ricks*.

B.

Rodrigue overturned a long line of decisions holding that admiralty law was applicable to personal injury actions under the Lands Act.

Similarly, *Ricks* drastically changed the prevailing rule in the circuits on the accrual issue — that date of actual change in employment status is the proper accrual time. This is clear from *Ricks* which held that the contrary rule of the Second and Third Circuits, *Egelston* v. *State University College at Genesco*, 535 F.2d 752 (2nd Cir. 1976) and *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert denied* 439 U.S. 821 (1979), was no longer good law. *Delaware State College* v. *Ricks*, 449 U.S. at 255. The First Circuit was simply wrong when it described *Bonham*, *supra*, as "at best suggestive" of a contrary accrual rule.

The First Circuit was also wrong as a matter of law in placing undue emphasis on *Birline* v. *Seagondollar*, 567 F.2d 560 (4th Cir. 1977), *cert denied* 444 U.S. 842 (1979) as a relevant pre-*Ricks* case supposedly standing for the *Ricks* rule. For one thing, *Bireline* was decided in December, 1977, *after* the acts of employment discrimination occurred. For another, *Bireline* has been described as a *tolling* case by another circuit, *Jackson* v. *Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979); it contains no reasoning whatever; and it even erroneously calls the

issue before it one of "fact." In addition, *Bireline* was not even cited by this Court in *Ricks* three years later! When taken together with an Eighth Circuit decision, *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), which the First Circuit concedes was "suggestive" of the pre-*Ricks* accrual rule, it is clear that the pre-*Ricks* rule was reasonably relied upon by Cross-Petitioners and the *Ricks* rule itself was not clearly foreshadowed.[5]

Ironically, the First Circuit's prior decision in *Fernandez* v. *Chardon* 648 F.2d 765 (1st Cir. 1981), summarily reversed by this Court in *Chardon* v. *Fernandez* 454 U.S. 6 (1981) (three Justices dissenting), also demonstrates that the prevailing accrual rule in the circuits prior to *Ricks* was one whereby the accrual date was the effective date of demotion. That First Circuit decision actually distinguished *Ricks* from the *Fernandez* cases and held that the pre-*Ricks* accrual rule was both prevailing and sound. If this was the First Circuit's view even after *Ricks*, surely it would have been that court's view had *Ricks* never been decided. Moreover, the fact that the First Circuit applied the pre-*Ricks* rule even after *Ricks* indicates that the *Ricks* rule and its applicability to these cases were not clearly foreshadowed in the case law.

What happened to the plaintiff in *Chevron Oil Company* with respect to a change in the law is strikingly similar, therefore, to what happened to the Cross-

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[5] Further demonstrating the unforeseeability of the *Ricks* rule is the fact that this Court's federal accrual decision in *United States* v. *Kubrick*, 100 S.Ct. 352 (1979), which applied the "discovery" rule to a Federal Tort Claims Act action, was handed down on November 28, 1979, well after these cases were filed. *See also Bradshaw* v. *Zoological Society*, 569 F.2d 1066, 1068 (9th Cir. 1978) which stated that as late as 1978 it was an open question whether federal or state accrual law governed § 1983 actions.

Petitioners in these cases. From the time the plaintiff in *Chevron Oil Company* was injured and until he instituted his lawsuit, "[i]t cannot be assumed that he did or could forsee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was." 404 U.S. at 107. Similarly, there was, until *Ricks* itself, no reason to believe that the prevailing federal accrual rule in employment discrimination actions would be changed. Cross-Petitioners relied on the law as it then was when they filed their suits. Just as was true in *Chevron Oil Company*, retroactive application of *Ricks* to these cases "would deprive [Cross-Petitioners] of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." 404 U.S. at 108.

Consequently, the First Circuit seriously misunderstood and misapplied this first *Chevron Oil Company* factor when it held that the *Ricks* rule was "clear" when the Cross-Petitioners were notified of their prospective demotions in April 1977. Indeed, under the First Circuit's unduly restrictive application of this factor, this Court's recent non-retroactivity decision in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (S.Ct. 6-28-82) would be questionable. After ruling that a certain Congressional grant of jurisdiction to the bankruptcy courts was unconstitutional, this Court went on to hold that its ruling was to be applied prospectively only. Even though there were two *directly conflicting* bankruptcy court decisions on the constitutionality of the challenged federal statute, this Court applied *Chevron Oil Company* and concluded, *inter alia*, that the issue presented was one of first impression whose resolution was not clearly foreshadowed. This conclusion, Cross-Petitioners submit, is equally applicable here.

C.

While the first *Chevron Oil Company* factor—the touchstone of the non-retroactivity issue—was especially misunderstood and misapplied by the First Circuit, the other two *Chevron Oil Company* factors also favor Cross-Petitioners. This Court in *Chevron Oil Company*, reasoning that the primary purpose of absorbing state law as federal law in the Lands Act "was to aid injured employees by affording them comprehensive and familiar remedies," observed that "retroactive application of the Louisiana Statute of Limitations to this case would deprive the [plaintiff] of any remedy whatsoever." It concluded: "To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress."

Similarly, the purposes of the accrual rule announced in *Ricks*—predictability, order, and fairness to the parties—would be furthered more faithfully by a holding of nonretroactivity in these cases. *Wiltshire* v. *Standard Oil Company of California*, 652 F.2d 837 (9th Cir. 1981). In addition, such a holding would not encourage the filing of state claims. *Id.*

Moreover, this Court in *Chevron Oil Company* stressed the drastic and inequitable result that would occur if the plaintiff's suit were barred retroactively by *Rodrigue*. The plaintiff had not "slept on his rights," his "potential redress of his allegedly serious injury" was entitled to protection, and he had gone through "lengthy and, no doubt, costly discovery stages for a year."

Similarly, the Cross-Petitioners here did not sleep on their rights. Also, they are entitled to their day in court for the vindication under 42 U.S.C. § 1983 of their First Amendment rights pursuant to *Elrod* v. *Burns*, 427 U.S.

347 (1976). This is especially significant in light of the fact that fifty-five of these cases already have gone to consolidated jury trial with a resulting finding of liability for political discrimination. Further, the substantial resources expended during the three years from filing through trial in all likelihood far exceed those expended by the plaintiff in *Chevron Oil Company*, who had only gone through discovery at the time his complaint was dismissed as time barred.

For the foregoing reasons, the First Circuit misunderstood and misapplied the *Chevron Oil Company* factors in conflict with *Chevron Oil Company* itself. This is further clearly demonstrated by other circuit court decisions properly applying the *Chevron Oil Company* factors in a very different manner from the First Circuit.[6]

2. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Raises Important Issues Which Were Unaddressed By This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson* And Which Now Require Clarification.

The First Circuit's decision in these cases is not only in direct conflict with this Court's decision in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971). These cases also raise important non-retroactivity issues which should be addressed now by this Court for the first time.

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[6] *See*, e.g., *Wachovia Bank and Trust Company* v. *National Student Marketing Corporation*, 650 F.2d 342 (D.C. Cir. 1980) (holding in reliance on *Chevron Oil Company* that its own unforeseeable limitations decision should not be applied retroactively to the federal securities causes of action before it) *and Wiltshire* v. *Standard Oil Company of California*, 652 F.2d 837 (9th Cir. 1981) (holding in reliance on *Chevron Oil Company* that a Supreme Court decision which unexpectedly changed EEOC limitations law to the plaintiff's detriment should not be applied retroactively).

The first issue relates to the question of *timing*. Under the *Chevron Oil Company* test, *when* should a court look at the litigant's claims arose, as asserted in *Wachovia Bank and Trust Co.* v. *National Student Association*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert denied* 452 U.S. 954 (1981); at the time the litigant filed his suit; or at the time the "new decision comes out," as was apparently done by the First Circuit in these cases? *See* Petitioners' Appendix, 20a-21a and footnote.

Second, these cases provide this Court with an opportunity to clarify the relationship between *Chevron Oil Company* and statute of limitations decisions. Whether such decisions deal with accrual, *e.g.*, *Delaware State College* v. *Ricks*, *supra*, and *United States* v. *Kubrick*, 100 S.Ct. 352 (1979), tolling, or the selection of the appropriate limitations period, e.g., *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), they arise with considerable frequency and often, as in these cases, can pose important retroactivity questions. The need to balance the limitations interests in repose and fairness to defendants—reflected in the *Ricks* case—against the interests in fairness and equity to litigants, typically plaintiffs—reflected in *Chevron Oil Company*—demands elaboration by this Court. Without this clarification, resources of litigants and federal courts alike will continue to be expended wastefully.

Third, this Court should clarify the relationship between the first *Chevron Oil Company* factor and the objective qualified immunity test for § 1983 damages liability. Under the latter, "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727, 2738 (1982) (emphasis added). Both the first *Chevron Oil Company* fac-

tor and the "objective" qualified immunity test focus on (1) the difficulty of predicting constitutional and statutory developments in the courts and on (2) fairness to litigants who must often make hard choices based on the law as they perceive it to be, whether they be plaintiffs or defendant government officials.

Just as this Court asserted in *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) that "a police officer is not charged with predicting the future course of constitutional law," similarly these Cross-Petitioners should not have been charged with predicting the future course of accrual law in *Ricks*. *Compare Procunier* v. *Navarette*, 434 U.S. 555 (1978) where this Court relieved prison officials of § 1983 damages liability as a matter of law because they could not reasonably have known of the existence of the Constitutional right asserted.

CONCLUSION

For these reasons, if the Court should grant the Petition for Writ of Certiorari, then Cross-Petitioners ask this Court to grant their Cross-Petition for Writ of Certiorari to deal with the important *Ricks* retroactively issues presented by this case.

Respectfully submitted,

Counsel of Record
JAIME R. NADAL ARCELAY,
CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

SHELDON H. NAHMOD
77 South Wacker Drive
Chicago, Illinois 60606
Tel. (312) 567-5761

Counsel for Cross-Petitioners